(1)

91-288

No.___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

BONG Y. KIM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Did the Court of Appeals err in affirming the District Court's granting of a summary judgment motion on behalf of the United States, based upon the District Court's conclusion that the only issues in the case were purely questions of law which left no genuine issue of fact to be considered by the Court and that the United States was entitled to summary judgment as a matter of law?

B. Does the term "knowingly transports" used in Title 31 U.S.C., Section 5316 require that a person have actual knowledge of the reporting requirement when transporting monetary instruments into the United States in order to subject those monetary instruments to civil forfeiture to the United States?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CITATIONS	iii
OPINIONS BELOW	2
GROUNDS FOR JURISDICTION	2
STATUTES AND RULES	3
STATEMENT OF THE CASE	6
ARGUMENT	8
CONCLUSION	15
APPENDIX	
A. Judgment Order of the Court of Appeals	A-1
B. Order of the Court of Appeals Sur Rehearing	A-3
C. Order of the District Court	A-4
D. Opinion of the District Court	A-5

TABLE OF CITATIONS

Cases: Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) 8

Baker v. Luken Steel Co., 793 F.2d 509, 511 (3rd Cir. 1986) 8

First National Bank of Pennsylvania v. Lincoln National Life Insurance Co., 824 F.2d 277, 280 (3rd Cir. 1986)..... 12

Friction Division Product v. E.A. Dupont de Nemour, 658 F. Supp. 1007 (D.Del. 1987).... 8

Gans v. Mundy, 762 F.2d 338, 341 (3rd Cir.), *cert. denied*, 474 U.S. 1010 (1985) 8

National Screen Service Corp. v. Pastei Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962)..... 9

State Farm v. Rosenfield, 683 F. Supp. 106 (E.D.Pa. 1988) 16

Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3rd Cir. 1987)..... 8

Tunis Bros. Co., Inc. v. Ford Motor Co., 763 F.2d 1482, 1489 (3rd Cir. 1985)..... 8, 9

U.S. v. Diebolo, Inc., 369 U.S. 654, 655 (1962).... 8

U.S. v. $4,255,625.39, 528 F. Supp. 969 (1981)... 9

U.S. v. $48,595.00, 705 F.2d 909, 914 (7th Cir. 1989) 13

U.S. v. $47,980.00 in Canadian Currency, 804 F.2d 1085 (9th Cir. 1986)..... 13

U.S. v. $20,757.83 in Canadian Currency, 769 F.2d 479 (8th Cir. 1985)..... 13

U.S. v. $359,500.00, 645 F. Supp. 638 (W.D.N.Y. 1986) 12,13,14

TABLE OF CITATIONS – *(Continued)*

Cases: Page

U.S. v. $24,900.00, 770 F.2d 1530, 1533 (11th Cir. 1985) 13,14,15

U.S. v. Grande, 595 F.2d 926, (5th Cir. 1978) 13

William v. Borough of Chester, 891 F.2d 458, 460 (3rd Cir. 1989)..... 8

Statutes and Rules:

18 U.S.C. §981(a)(1) and (2) 3

18 U.S.C. §981(a)(1)(c)..... 6,7,12

18 U.S.C. §981(a)(2) 11,12,13,14

28 U.S.C. §1254(1) 2

31 U.S.C. §5313(a) 4

31 U.S.C. §5316 6,10,12

31 U.S.C. §5316(a) 5

31 U.S.C. §5316(c) 13

31 U.S.C. §5317(c) 4,7,12,13,14

31 U.S.C. §5322..... 13

31 U.S.C. §5324..... 5

31 U.S.C. §5324(3) 7

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Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Bong Y. Kim, Defendant in the District Court and Appellant in the Court of Appeals respectfully petitions this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit for review and vacatur of the judgment entered by the Court of Appeals on March 18, 1991, (and the order entered April 11, 1991, in response to Petitioner's petition for rehearing) in the matter captioned UNITED STATES CURRENCY CONTAINED IN CERTIFICATE OF DEPOSIT #48050052-8, IN THE NAME OF BONG Y. KIM, AT FIRSTRUST SAVINGS BANK, 701

HAMILTON MALL, ALLENTOWN, PA 18101 and CERTIFICATE OF DEPOSIT #06-65-017164 IN THE NAME OF BONG Y. KIM AT HILL FINANCIAL SAVINGS ASSOCIATIONS, 400 MAIN STREET, RED HILL, PA and SAVINGS ACCOUNT #823581709, and CHECKING ACCOUNT #15134933, BOTH ACCOUNTS IN THE NAME OF BONG Y. KIM AT MERIDIAN BANK, 7TH and HAMILTON STREETS, ALLENTOWN, PA 18101, BONG Y. KIM, Appellant and docketed in the Court of Appeals at No. 90-1784, which affirmed the decision of the United States District Court for the Eastern District of Pennsylvania (D.C. Civ. No. 88-2040) and which permits the appellee United States of America to forfeit the said currency appearing in the caption of the case, which is the property of Petitioner Bong Y. Kim, on the basis of a summary judgment.

OPINIONS BELOW

The text of the opinion of the District Court is set forth as Appendix D to this petition. The opinion of the District Court has not been published. The Court of Appeals issued no written opinion, so there has been no publication.

GROUNDS FOR JURISDICTION

The judgment order of the Court of Appeals was filed on March 18, 1991, and the order denying Petitioner's petition for rehearing was filed on April 11, 1991. The text of the order of the Court of Appeals sur rehearing is set forth as Appendix B to this petition. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Honorable Court by 28 U.S.C. §1254(1).

STATUTES AND RULES

Title 18, U.S.C. §981(a)(1) and (2) states:

> (A)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:
>
> > (a) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal Bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.
> >
> > (b) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act), within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States.
> >
> > (c) Any property, real or personal which constitutes or is derived from proceeds traceable to a violation of section 215, 656, 1005, 1006,

1007, 1014, 1032, or 1344 of this title or a violation of section 1341 or 1342 of such title affecting a financial institution.

(2) No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder.

Title 31 U.S.C. §5313(a) states:

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

Title 31 U.S.C. §5317(c) states:

(c) If a report required under section 5316 with respect to any monetary instrument is not filed (or if filed, contains a material omission or misstatement of fact), the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States Government. A monetary instrument transported by mail or a common carrier, messenger, or bailee is being transported under this subsection from the time the instrument is delivered to the United States Postal Service, common carrier,

messenger, or bailee through the time it is delivered to the addressee, intended recipient, or agent of the addressee or intended recipient without being transported further in, or taken out of, the United States.

Title 31 U.S.C. §5316(a) states:

(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—

(1) transports or has transported monetary instruments of more than $5,000 at one time—

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through a place outside the United States, or

(2) receives monetary instruments of more than $5,000 at one time transported into the United States from a place outside the United States.

Title 31 U.S.C. §5324 states:

No person shall for the purpose of evading the reporting requirements of §5313(a) with respect to such transaction—

(1) cause or attempt to cause a financial institution to fail to file a report required under §5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under §5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist into structuring, any transaction with one or more domestic financial institutions.

STATEMENT OF THE CASE

In December, 1987, Bong Y. Kim enlisted the aid of Lieutenant Colonel Gary Flack (U.S. Army, Retired), a former military friend, in getting $350,000.00 of his deceased father's estate out of the Republic of Korea. Although Kim's father was a preeminent jurist in Korea, Korean laws (which have since been repealed) forbade removal of such funds from the country. Kim anticipated Flack would accomplish this deed due to their prior relationship and would comply with any U.S. Customs Service requirements.

However, upon his return to the United States on December 31, 1987, Flack failed to file the postcard-size declaration form for $349,700.00 he was transporting and then demanded 5% as a service fee.

The United States sought civil forfeiture of the estate proceeds under 18 U.S.C. §981(a)(1)(C), pursuant to the Complaint for Forfeiture which was stayed, pending disposition of the criminal charges, on October 31, 1988.

On November 18, 1988, 18 U.S.C. §981(a)(1)(C) was repealed.

On December 6, 1988, pursuant to a plea agreement, Kim entered a guilty plea to the following counts in the criminal indictment:

COUNT 1

Conspiracy to transport approximately $349,000 in United States currency into the United States without filing the proper Customs reporting forms, in violation of 31 U.S.C. §5316.

COUNT 2

Structuring on January 6, 1988, the deposit of $9,000 in United States currency into a bank account to evade the requirement of filing a Currency Transaction Report, in violation of 31 U.S.C. §5324(3).

COUNT 40

Structuring on January 19, 1988, the deposit of $8,500 in United States currency into a bank account to evade the requirement of filing a Currency Transaction Report, in violation of 31 U.S.C. §5324(3).

On March 13, 1989, the remaining 37 counts were dismissed, and the Honorable Judge Edmund V. Ludwig sentenced Kim to probation.

Thereafter, the government amended its Complaint for Forfeiture to include forfeiture under 31 U.S.C. §5317(c), because 18 U.S.C. §981(a)(1)(C) had been repealed, and, even if it were still in force, it would have only been applicable to the currency involved in Count 2 and Count 40 of the indictment.

Thus, when Kim changed his plea from not guilty to guilty and was sentenced by Judge Ludwig, only $17,500.00 was subject to forfeiture.

As Kim clearly indicated in his sworn testimony on December 6, 1988, he was unaware of Flack's failure to file required Customs' forms until after the courier was back in Los Angeles, and Kim's actions after that date were only designed to preclude Korea from discovering the money had been spirited out of that country and to prevent official reprisals or retribution against Kim's relatives remaining there.

On October 11, 1990, the District Court entered an order granting the government's motion for a summary judgment, which was appealed to the Court of Appeals on October 22, 1990.

On March 18, 1991, the Court of Appeals affirmed the District Court's decision, and on April 11, 1991, after a petition for rehearing was filed with the Court, an order was entered denying the rehearing petition.

ARGUMENT

The decision below should be reviewed because it involves serious issues regarding the denial of a litigant of his day in court in order to prevent the United States from confiscating his personal property. The decision of the Court of Appeals conflicts with and departs from other decisions rendered by other Courts of Appeal on a question of law that has not been the subject of a written opinion of this Honorable Court.

A. The District Court erred in granting a Summary Judgment based on evidence of record and in finding that there was no genuine issue of material fact.

Ruling on a motion for Summary Judgment, the court must consider the evidence in a light most favorable to the non-moving party, *United States v. Dieblo, Inc.,* 369 U.S. 654, 655 (1962); *Baker v. Lukens Steel Co.,* 793 F.2d 509, 511 (3d Cir. 1986), must give that party benefit of all reasonable inferences arising from the evidence, *Tigg Corp. v. Dow Corning Corp.,* 822 F.2d 358, 361 (3d Cir. 1987); *Gans v. Mundy,* 762 F.2d 338, 341 (3d Cir. 1985) *cert. denied,* 474 U.S. 1010 (1985), and must take as true all allegations of the non-moving party that conflict with those of the movant, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Williams v. Borough of Chester,* 891 F.2d. 458, 460 (3d Cir. 1989).

In *Friction Division Product v. E.I. Dupont de Nemours,* 658 F. Supp. 1007 (D. Del. 1987), a standard for summary judgment was defined, so that "the District Court should only decide the case as a matter of law where facts are undisputed or evidence is so one-sided that it leaves no room for any reasonable difference of opinion as to any material fact," *Tunis Bros. Co., Inc. v.*

Ford Motor Co., 763 F.2d. 1482, 1489 (3d Cir. 1985). Also, the moving party must "positively and clearly demonstrate that there is no genuine issue of fact and any doubt as to the existence of such an issue is resolved against him." *United States v. $4,255,625.39,* 528 F. Supp. 969 (1981), *National Screen Service Corp. v. Pastei Exchange, Inc.,* 305 F.2d 647, 651 (5th Cir. 1962).

The government, in moving for Summary Judgment, and the District Court below, in deciding to grant the motion, relied upon various documentary exhibits, submitted in conjunction with the Motion for Summary Judgment and subsequent Reply Memorandum of Law in support thereof, to establish the initial burden of the government, as the moving party, to demonstrate the absence of any genuine issue of material fact.

It is difficult to determine from the lower court's Memorandum exactly which of those documents was specifically relied upon.

In Footnote 3, the Honorable Judge Lowell Reed indicated he had not decided the authenticity of Kim's Diary (Exhibit B to Motion for Summary Judgment), but the genuineness of the document is irrelevant, because "it is not dispositive of the case and the result would be the same even if the diary did not exist."

However, the court also seemingly relied upon Kim's Diary in Footnote 8, which states:

> "However, . . . even if the guilty plea was entirely admissible, the other documents submitted by the government, such as Special Agent Campbell's affidavit and memorandum of interview, and Kim's Diary are sufficient to meet the government's burden and shift the burden of proof to the claimant."

The same type of bifurcated treatment of assigning reliability is also applied to the content of the Claimant's plea colloquy at the criminal proceeding in the District Court.

In his Factual Background, Judge Reed affirmatively found Kim "further stated that he was unaware of the reporting requirements and he assumed that Flack would have transported the currencies in a lawful manner," (p. 3 of Memorandum quoting p. 36 of Exhibit D to government's Motion for Summary Judgment).

Yet, the court, in addition to comments in Footnote 8, also found "perhaps most compelling the . . . plea colloquy in which Kim pleaded guilty to conspiring to violate 31 U.S.C. Section 5316 and to two counts of money laundering in violation of Section 5324 with respect to the currency in question," (p. 7 of Memorandum), in determining the government had clearly met its burden as to the *res* necessary to shift the burden of proof to the petitioner to demonstrate "by a preponderance of evidence that the United States currency in question was not in fact subject to forfeiture."

Therefore, the court apparently based its initial decision on the non-existence of any genuine issue of material fact upon a diary that was non-dispositive of the case and a plea colloquy which was both "most compelling" and irrelevant, if it was not entirely inadmissible.

Other documents submitted by the government were likewise flawed, although in a more obvious manner, as the Court observed when it noted that the Memorandum of Interview with Bong Kim (Exhibit A) and the Affidavit of Special Agent Wayne Campbell were unsigned when originally submitted to the District Court (Footnote 3, Memorandum). However, this blatant defect was "cured" by the attachment of properly signed copies of the respective documents to the government's Reply Memorandum of Law.

This curative process completely disregards the question of when those documents were signed, as they were allegedly created and authenticated in 1988 or more than two years afterward as the government was seeking to "cure" its sick evidence.

Therefore, the quality and quantity of evidence utilized by the government to sustain its initial burden is

highly suspect or equivocal at best, as demonstrated amply by the District Court in utilizing some of it for one argument, while discarding it for another argument, and vice versa.

Furthermore and in particular, Petitioner claims there is clearly an issue of material fact which precludes Summary Judgment, to wit, whether the alleged violations were committed without Petitioner's knowledge. This is, the Court will note, a statutory defense made available in 18 U.S.C. §981 (a)(2), which provides:

> 2) No property shall be forfeited under this section to the extent of the interest of owner or lienholder by reasons of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder.

The court clearly erred by ignoring said defense and by inferring that it doesn't matter who committed the offense (or knew about said commission) because the proceedings were technically *in rem*.

Judge Reed stated (at p. 6 of his Memorandum) that "[i]n an *in rem* action the government does not need to show that any particular individual transported the currency into the United States, it is sufficient to show the currency to be forfeited is traceable to the statutory violation."

That analysis fails because it permits the government to disregard the applicable and available statutory defense in §981 (a)(2) in meeting its initial burden of demonstrating the absence of any genuine issue of material fact.

Petitioner's firmness in his plea colloquy and throughout these proceedings that he was unaware Flack was not going to file the 4790 form upon arrival in Los Angeles, proves there is an "act or omission established by that owner . . . to have been committed without the knowledge of that owner . . .", established by Kim, and that has invoked application of the provisions of

§981 (a)(2) and effectively precludes the United States from proceeding with the forfeiture unless and until it can be definitively proved that the defense of §981 (a)(2) is not available to the owner of the subject currency. Required definite proof does not exist in this case.

Consequently, the government failed to meet its burden of demonstrating total absence of genuine issues of material fact which "is initially on the moving party regardless of which party would have the burden of persuasion at trial." *First National Bank of Pennsylvania v. Lincoln National Life Insurance Company,* 824 F.2d 277, 280 (3d Cir. 1987). It was error to grant Summary Judgment under those circumstances.

B. "Knowingly Transports" in 31 U.S.C. §5316 requires actual knowledge of the reporting requirement, and forfeiture under 18 U.S.C. §981 (a)(1)(c) requires actual knowledge of the statute.

In this case there exists a significant issue about Petitioner's "knowing transport" of the currency in violation of 31 U.S.C.§5316 and "knowledge" of the statute under 18 U.S.C.§981 (a)(1)(c) and 31 U.S.C. §5317 (c).

> "Before currency can be subject to a civil forfeiture proceeding pursuant to the Currency and Foreign Transactions Reporting Act, based on failure to declare it before attempting to transport it into or out of the country, party must have actual knowledge of reporting requirement." *United States v. $359,500 in United States Currency,* 645 F. Supp. 638, (N.D.N.Y. 1986).

Petitioner is not a United States native, but a resident alien and emigre from Korea. His main focus was on the legal difficulties of getting the money out of Korea, rather than unknown legal problems involved in getting it into the United States. He enlisted Flack to transport the money out of Korea and into the United States without any knowledge of the statute or reporting requirements of United States Customs Service.

The court below claims that forfeiture under 31 U.S.C.§5317 (c) does not require actual knowledge of that reporting requirement. There is case law to support that view, *[United States v. $359,500 in United States Currency,* 828 F.2d 930 (2d. Cir. 1987); *United States v. $47,980 in Canadian Currency,* 804 F.2d. 1085 (9th. Cir. 1986); and *United States v. $20,757.83 in Canadian Currency,* 769 F.2d. 479 (8th. Cir. 1985)], but there is also a substantial body of case law which holds an opposite position, that a "knowing transporter" subject to 31 U.S.C. §5317 (c) civil forfeiture is one who willfully violates the reporting requirement and is subject to criminal prosecution under 31 U.S.C. §5322. *United States v. $24,900,* 770 F.2d. 1530, 1533 (11th. Cir. 1985); Cf. *United States v. $48,595,* 705 F.2d. 909, 914 (7th Cir. 1989). This case law requiring knowledge obviously agrees and comports with the "unknowing owner" defense found in 18 U.S.C. §981 (a)(2).

A third circuit court has held the terms "knowingly" and "willfully" require proof of knowledge of the reporting requirement and specific intent to commit the crime, and Congress by adding these terms, took this statute out of the ranks of strict liability crimes:

> ". . . because the failure to report, when one is without knowledge of the reporting requirement, must be classified as a "nonfeasance" as opposed to a "misfeasance"." *United States v. Grande,* 565 F.2d. 926, (5th Cir. 1978).

As in most civil cases, a penalty or forfeiture may be sustained by the preponderance of the evidence, but here the government failed to show the Petitioner either willingly or knowingly failed to file the necessary forms. It was Flack alone who transported the money and failed to file the forms.

In *United States v. One (1) lot of $24,900 in United States Currency, supra,* the court held:

> "actual knowledge of the currency requirement by the person from whom the monetary instrument was seized is a necessary element of a civil forfeiture action under 31 U.S.C. §5317 (b), [now §5317 (c)]" at 1533. Alternatively, the court in *United States v. $359,500 in United States currency,* 645 F.Supp. 638, 643 (W.D.N.Y. 1986), ruled that even if "actual knowledge is not required for a civil forfeiture, some notice, or opportunity to learn, must be provided."

Unless the government proves actual knowledge of the statute, and implementing regulations, on Petitioner's part, the United States has not resolved the factual and legal issues involved.

In view of the legislative history and the provisions of 18 U.S.C. §981 (a)(2), it makes little sense to interpret "knowingly" as not applying to the reporting requirement. The purpose of the Act — obtaining reports — can only be achieved if travelers are aware of the reporting requirements. If one is unaware of the reporting requirement, one cannot be expected to comply, notwithstanding the possibility of a subsequent forfeiture or any other sanction. *United States v. $359,500, supra,* at 641.

The government has clearly not met its burden to demonstrate the property is subject to forfeiture under both 18 U.S.C. §981 and 31 U.S.C. §5317.

The purpose of the reporting requirement on currency exports and imports is not intended to limit or impede the free flow of currency in international commerce.

> "Failure to require knowledge of the reporting requirements could well impede the mobility of international capital into and out of the United States. A signal would be sent that the United States law may well be filled with booby-traps that spring

without warning to grab the currency of unsuspecting travelers." *United States v. $24,900, supra,* at 1535.

The currency in this case was not an ill-gotten gain from an illegal activity, but the legacy from a father's estate. "Possessing and transporting currency is in and of itself legal. There is no inherent notice, as in the case of narcotics or firearms, that there may be limitations on its transportation across a border." *United States v. $359,500, supra,* at 643.

Based upon foregoing, it was clearly erroneous for court to allow confiscation of the Petitioner's currency.

CONCLUSION

The foregoing facts and law clearly establish several genuine issues of material fact which require the necessity of a jury trial. The government's evidence was deficient and incomplete, raising sufficient doubt as to the absence of genuine issues to deny summary judgment. Substantial case law requires actual knowledge of the reporting requirement and therefore cannot sustain forfeiture in this case. The confiscation of the currency was erroneous and the summary judgment improper and wrongfully granted.

Petitioner has established the currency was not "dirty" or from an illegitimate source. On the contrary, it is the financial residue of his late jurist-father's real estate holdings in Korea. It is indeed ironic and, moreover, tragic, that the accumulation of the honest labor of two lifetimes is being confiscated by American statutes created in 1986 as part of the Anti-Drug Abuse Act to deprive international drug barons of their ill-gotten gains.

He has also established that this case is replete with unresolved issues of facts and law.

Those issues and potential defenses have not and cannot be resolved on their merits in the inadequate forum of a summary judgment. Like three of the four

defendants in *State Farm v. Rosenfield,* 683 F. Supp. 106 (E.D. Pa. 1988), all of whom had previously offered a plea of guilty to several counts, Kim deserves his day in court on the issues, because, here, as in *Rosenfield,* the issues of disputed fact in the record and the changing posture of the recent law and regulations in this matter demand the necessity of a jury determination.

WHEREFORE, Petitioner respectfully requests this Honorable Court grant his petition and set aside and vacate the Judgment Order of the Court of Appeals for the Third Circuit entered March 18, 1991, and remand the case for further proceedings.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1784

UNITED STATES OF AMERICA

UNITED STATES CURRENCY CONTAINED IN CERTIFICATE OF DEPOSIT 48050052-8, IN THE NAME OF BONG Y. KIM, AT FIRSTRUST SAVINGS BANK, 701 HAMILTON MALL, ALLENTOWN, PA 18101 and CERTIFICATE OF DEPOSIT 06-65-017164 IN THE NAME OF BONG Y. KIM AT HILL FINANCIAL SAVINGS ASSOCIATIONS, 400 MAIN STREET, RED HILL, PA and SAVINGS ACCOUNT #823581709, AND CHECKING ACCOUNT #15134933, BOTH ACCOUNTS IN THE NAME OF BONG Y. KIM AT MERIDIAN BANK, 7TH AND HAMILTON STS., ALLENTOWN, PA. 18101

BONG Y. KIM,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 88-02040)
District Judge: Honorable Lowell A. Reed, Jr.

Submitted Under Third Circuit Rule 12(6)
March 11, 1991
Before: MANSMANN, HUTCHINSON and WEIS,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is
ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

Carol Lost Mansmann
Circuit Judge

Attest:

Sally Mrvos
Sally Mrvos, Clerk

March 18, 1991

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1784

UNITED STATES OF AMERICA
vs.
U.S. CURRENCY, ETC.

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,*
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO
and WEIS, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Carol Los Mansmann

Circuit Judge

April 11, 1991

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* Senior Circuit Judge Weis voted only as to panel rehearing.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
UNITED STATES CURRENCY,	:	
CONTAINED IN CERTIFICATE	:	
OF DEPOSIT; 48050052-8, IN	:	
THE NAME OF BONG Y. KIM,	:	
AT FIRSTRUST SAVINGS BANK,	:	
701 HAMILTON MALL,	:	
ALLENTOWN, PA 18101, et al.,	:	
Defendants.	:	NO. 88-2040

ORDER

AND NOW, this 9th day of October, 1990, upon consideration of plaintiff United States' motion for summary judgment, affidavits, and documents of record, and for the reasons set forth in the attached memorandum, it is hereby ORDERED that summary judgment is entered in favor of plaintiff United States and against defendant United States Currency, et al., and defendant Currency is hereby forfeited to the United States pursuant to 31 U.S.C. §5317(c) and 18 U.S.C. §981(a)(1)(C).

LOWELL A. REED, JR., J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
UNITED STATES CURRENCY, CONTAINED IN CERTIFICATE OF DEPOSIT; 48050052-8, IN THE NAME OF BONG Y. KIM, AT FIRSTRUST SAVINGS BANK, 701 HAMILTON MALL, ALLENTOWN, PA 18101, et al.,	:	
Defendants.	:	NO. 88-2040

MEMORANDUM

Reed, J. October 9, 1990

Plaintiff, United States brought this *in rem* action seeking forfeiture of defendant, United States Currency[1] pursuant to 31 U.S.C. §5317(c)(Supp. 1990) and 18 U.S.C. 981(a)(1)(C)(Supp. 1990)[2] for its transportation into the United States without filing the proper forms in violation of 31 U.S.C. §5316 (Supp. 1990) and structuring transactions with said currency to avoid filing currency transaction reports (CTRs) in violation of 31 U.S.C. §5324 (Supp. 1990).

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1. Defendant United States Currency is contained in certificate of deposit #48050052-8 at Firstrust Savings Bank, certificate of deposit #06-65-017164 at Hill Financial Savings Association, and savings account #8235831709 and checking account #15134933 both at Meridian Bank.

2. Congress repealed 18 U.S.C. 981(a)(1)(C) in November 1988. It has substantively been replaced by the amended 18 U.S.C. 981(a)(1)(A). However, because the government brought a proper action prior to the repeal, 981(a)(1)(C) is still applicable to this action. See 1 U.S.C. 109 (Supp. 1990).

Before me is the motion of plaintiff United States for summary judgment. For the reasons set forth below, the motion of plaintiff shall be granted.

FACTUAL BACKGROUND

The relevant facts of this case are not in dispute. About September 1987, Bong Y. Kim discussed transporting approximately $350,000.00 into the United States with Gary L. Flack, a retired U.S. Army Lieutenant Colonel. After several discussions Kim and Flack arranged the details whereby Flack would fly to Korea at Kim's expense, contact Kim's cousin and return with the money. Flack carried out the arrangement and upon his return to the United States met Kim at the airport to transfer the money. Flack informed Kim that when he went through U.S. Customs he had hidden some currency in his boots and most of it in his luggage. Flack, who had not filed a custom's report for the transfer of currency over $10,000.00, also demanded five percent of the currency for his services. *See* Memorandum of Interview, Exhibit A to plaintiff's motion for summary judgment at 4-6 (interview between Bong Y. Kim and Internal Revenue Service Special Agent Wayne E. Campbell) [hereinafter Memorandum of Interview].

Kim first attempted to convert the $349,700 in currency into a cashier's check. However, when he was informed that a CTR would have to be filed he left the bank without converting the money. Kim then learned that he could inconspicuously deposit under $10,000.00 into several bank accounts and thereby avoid filing any CTRs or attracting any attention. *See* Memorandum of Interview at 7. Subsequently, Kim made 36 deposits of $8,500 to $9,600 in United States currency at eleven banks between January 6, 1988 and January 19, 1988. *See* Affidavit of Wayne Campbell, Exhibit C to plaintiff's motion for summary judgment at 3-5, 8-10, 13, and 16 Kim then consolidated these accounts into four separate

accounts by January 21, 1988. *Id*, at 16-17; *see also* Kim's Diary, Exhibit B to plaintiff's motion for summary judgment.

Based on the foregoing information, Internal Revenue Service Special Agent Wayne Campbell obtained a warrant and defendant United States currency was seized. *See* Warrant for Arrest in Action *In Rem* (Document No. 3). Kim and Flack were charged with conspiring to transport approximately $349,000 in United States currency into the United States without filing the customs reporting forms, in violation of 31 U.S.C. § 5316. *See* Plaintiff's Memorandum of Law at 6. Kim was further charged with 39 counts of money laundering by structuring his transactions to avoid filing CTRs, in violation of 31 U.S.C. § 5324. *See* Transcript of Plea Hearing, Exhibit D to plaintiff's motion for summary judgment, Kim pled guilty to the following three counts of the indictment: Count 1, conspiring to transport more than $10,000 in United States currency into the United States without filing the required forms, and Counts 2 and 40, knowingly and willfully structuring and attempting to structure a transaction to avoid the reporting requirements.

At the plea hearing on his guilty plea, Kim stated that his money was lawfully obtained through the sale of property he inherited from his father in Korea. Transcript of Plea Hearing, Exhibit D to plaintiff's motion for summary judgment at 25-27. He further stated that he was unaware of the reporting requirements and he assumed that Flack would have transported the currency in a lawful manner. *Id*, at 36. Finally, Kim stated that his purpose in attempting to avoid all reporting requirements was to prevent the Korean government from becoming aware of the transfer because of a Korean law, which has since been repealed, that prohibited the exportation of currency. He was concerned that his family who had remained in Korea not be penalized or have their employment positions jeopardized by his actions in violating Korean law. *Id*, at 37-40.

Based upon these facts, Plaintiff United States now moves for summary judgment. In response Kim argues that there remains several genuine issues of material fact in this case precluding summary judgment. Kim contends that pursuant to promises made outside the written plea agreement between himself and the United States, plaintiff is unable to pursue this forfeiture action. Alternatively, he argues that even if the government is entitled to the forfeiture it should be limited to $17,500.00, the total amount involved in counts 2 and 40 to which he pled guilty. Finally, Kim argues that the United States is required but unable to show he had actual knowledge of the reporting requirements of 31 U.S.C. § 5316.[3]

DISCUSSION

Under the Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 340-41 (3d Cir. 1990). For a dispute to be "genuine", the evidence must be such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Williams v. Borough of Chester*, 891 F.2d 458,

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3. Claimant also stated that the Memorandum of Interview, Exhibit A to plaintiff's motion for summary Judgment and Affidavit of Wayne Campbell and Seizure Warrant, Exhibit C to plaintiff's motion for summary judgment are not admissible because they are unsigned. The United States has cured this defect by attaching signed copies of each in its reply memorandum of law. In addition, claimant claims that Kim's Diary, Exhibit B to plaintiff's motion for summary judgment, is not "viable evidence" – because it is not signed by Kim or completed entirely in his handwriting. I will not rule on the authenticity of the entire diary except to state that it is not dispositive of the case and the result would be the same even if the diary did not exist.

460 (3d Cir. 1989). To establish genuine issue of material act, the non-moving party must introduce evidence beyond the mere pleadings to create an issue of material fact on "an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett,* 477 U.S. 317, 322 (1986). The burden of demonstrating the absence of genuine issues of material fact is initially on the moving party regardless of which party would have the burden of persuasion at trial. *First Nat'l Bank of Pennsylvania v. Lincoln Nat'l Life Ins. Co.,* 824 F.2d 277, 280 (3d Cir. 1987). Following such a showing, the non-moving party must present evidence through affidavits or depositions and admissions on file, which comprise of a showing sufficient to establish the existence of every element essential to that party's case.[4] *Celotex*, 477 U.S. at 323. If that evidence is, however, "merely colorable" or is 'not significantly probative,' summary judgment may be granted." *Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp.*, 812 F.2d 141, 144 (3d Cir. 1987) (quoting, in part, *Anderson*, 447 U.S. at 249-50).

The United States is seeking civil forfeiture pursuant to 18 U.S.C. § 951(a)(1)(C)[5] and 31 U.S.C.

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4. In ruling on a motion for summary judgment, the court must consider the evidence presented in a light most favorable to the non-moving party, *United States v. Diebolo, Inc.*, 369 U.S. 654, 6SS 1962); *Baker v. Lukens Steel Co.,* 793 F.2d 509, 511 (3d Cir. 1986), must give that party the benefit of all reasonable inferences arising from that evidence, *Tigg v. Dow Corning Corp.,* 822 F.2d 358, 361 (3d Cir. 1987); *Gans v. Mundy,* 762 F.2d 338, 341 (3d Cir.), *cert. denied,* 474 U.S. 1010 (1985), and must take as true all allegations of the non-moving party that conflict with those of the movant. *Anderson,* 477 U.S. at 255.

5. Prior to the 19th amendment, 981(a)(1)(C) provided that, any coin and currency, or other monetary instrument as the Secretary of the Treasury may prescribe, or any interest in other property, including any deposit in a financial institution, traceable to such coin or currency involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31 be seized or forfeited if the violation is by a domestic

§ 5317(c)[6]. In a civil forfeiture action the government has the initial burden of establishing probable cause for forfeiture. Probable cause may be established by showing a reasonable basis to believe there is a substantial connection between "the property to be forfeited and the criminal activity defined by the statute." *United States v. Premises Known as 2639 Meetinghouse,* 633 F.Supp. 979, 986 (E.D. Pa. 1986). In an *in rem* action the government does not need to show that any particular individual transported the currency into the United States, it is sufficient to show that the currency to be forfeited is traceable to the statutory violation, which in this case is a violation of 31 U.S.C. § 5316 and 31 U.S.C. § 5324. The burden then shifts to the claimant to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture. *Id.* at 987.

The government has clearly met its burden demonstrating probable cause to believe the property is subject to forfeiture under both 18 U.S.C. § 981 and U.S.C. § 5317. The United States has submitted "evidence of Kim's admissions, Kim's and Flack's criminal adjudications and the information from the banks" in support of its position. Plaintiff's Memorandum of Law at 10. The affidavit of Special Agent Wayne Campbell, contained in the seizure warrant, detailed the chronology of Kim's attempts to structure his currency transactions in order to avoid filing currency transaction report. The basis of

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NOTES *(Continued)*

financial institution examined by a federal bank supervisory agency or financial institution regulated by the Securities and Exchange Commission or a partner, director, officer, or employee thereof.

18 U.S.C. § 981(a)(1)(C)(Supp. 1990).

6. 31 U./S.C. § 5317(c) provides in pertinent part,

If a report required under section 5316 with respect to any monetary instrument is not filed . . . the instrument and any interest in property, including a deposit in a financial institution traceable to such instrument may be seized and forfeited to the United States Government.

31 U.S.C. § 5317(c)(Supp. 1990).

his affidavit included interviews with various bank employees who provided him with information regarding Kim's transaction records including dates, amounts and account numbers. *See* Affidavit of Wayne Campbell, Exhibit C to plaintiff's motion for summary judgment. The government presented Kim's dairy which contained Kim's own recordings of his transactions. *See* Dairy, Exhibit B to plaintiff's motion for summary judgment. Furthermore, and perhaps compelling, the government submitted Kim's plea colloquy in which Kim pleaded guilty to conspiring to violate 31 U.S.C. § 5316 and to two counts of money laundering in violation of § 5324 with respect to the currency in question. *See* Transcript of Plea Hearing, Exhibit D to plaintiff's motion for summary judgment at 32. Based on this evidence the government has met its burden as to the *res*.

The government, having established that the currency in question was traceable to the violations of § 5316 and § 5324, shifted the burden of proof to the claimant to show by a preponderance of the evidence that the United States currency in question was not in fact subject to forfeiture. Kim, however, is unable to meet this burden or present any inference from which a genuine issue of material fact may be drawn.

Kim makes three arguments limiting the use of the guilty plea. First, Kim states that the government is not entitled to bring a forfeiture action at all because, pursuant to promises made outside the written plea agreement between himself and the United States, it promised not to do so. Kim relies on *Santobello v. New York*, 404 U.S. 257 (1971). Kim asserts that since the government breached this alleged oral promise he is entitled to withdraw his guilty plea or receive specific performance of the alleged promise. Kim cites *United States v. United States Currency the Amount of $228,536*, 895 F.2d 908 (2d Cir. 1990). Second, Kim argued that since he only pled guilty to two counts of money laundering, only that amount subject to those counts, a total of $17,500.00, should be put in jeopardy

of forfeiture. Third, Kim argues that the plea should not be used for the government's claim under 31 U.S.C. § 5317(c) because that claim was not part of their civil forfeiture action at the time his plea was given and he was therefore unaware that he was placing the entire amount in jeopardy of forfeiture.[7]

These arguments fail in light of Kim's plea agreement and colloquy. Kim, while under the advice of counsel, was specifically questioned and denied that any promises were made to him outside of the ones set forth in the plea agreement and that any promises made would be in writing signed by the parties. *See* Guilty Plea Transcript at 16; see also Plea Agreement, Exhibit F to plaintiff's reply memorandum to motion for summary judgment. Furthermore, Kim stated that he knew what was involved in the guilty plea and that it was the best decision under the circumstances. It is clear that Kim knowingly and voluntarily agreed to the terms of his plea agreement. Kim is, therefore, estopped from now asserting otherwise as a basis for excluding the government's use of the plea in support of its motion, withdrawing his plea or precluding the government from bringing a forfeiture action. *See Stassi v. United States*, 439 F.Supp. 277 (D.N.J. 1976), *aff'm*, 559 F.2d 1210 (3d Cir. 1977). Consequently, the guilty plea will properly serve as an admission to establish that defendant currency was traceable to violations of § 981 and § 5316.

With respect to Kim's second and third arguments regarding the guilty plea there is no requirement that a defendant be informed of the collateral consequences of pleading guilty and the government is therefore entitled to seek civil forfeiture of the entire amount. *See United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988) (Rule 11 does not require explanation of collateral

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7. Government amended its complaint December 18, 1989 (Document No. 15) after claimants' guilty plea hearing.

consequences, that is, "consequences not related to the length or nature of the sentence imposed on the basis of the plea.")[8]

Kim next argued that the term "knowingly transports" in 31 U.S.C. § 5316 requires actual knowledge of the reporting requirement in order to be held liable for forfeiture under 31 U.S.C. § 5317(c). There is no uniformity among the circuits as to this point, however, the majority of courts, including those in the Third Circuit, have held that actual knowledge is not required for civil forfeiture. *See United States v. $359,000 in United States Currency,* 828 F.2d 930, 932-33 (2d Cir. 1987) (see cases cited therein).[9]

In *United States of America v. $20,900.00 in United*

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8. Kim contends that the guilty plea limits the amount which can be confiscated to just $17,500.00 on the government's 981 claim because that is all that he pled guilty to money laundering. However, it is not necessary to make that determination at this time because even if the guilty plea was entirely inadmissible, the other documents submitted by the government, such as Special Agent Campbell's affidavit and memorandum of interview, and Kim's diary are sufficient to meet the government's burden and shift the burden of proof to the claimant. In addition, defendant United States currency is already subject to forfeiture under 31 U.S.C. § 5317(c) pursuant to this memorandum and the attached order.

9. In *United States v. $359,000 in United States Currency,* the court followed the majority vote holding that actual knowledge of the reporting requirement of 31 U.S.C. § 5316 is not required. It distinguished between one who "willfully" violates the reporting requirements and is subject to criminal penalties and one who "knowingly" violates the reporting requirements and is subject to civil penalties, the former requiring actual knowledge and specific intent to violate it. In reaching its conclusion, however, the court stated that due process requires constructive knowledge but the court did not decide whether the enactment of § 5316 alone would provide sufficient notice. *Id.* at 935.

The minority view, which the claimant argues, "equates a person who 'knowingly' transports money and is subject to the civil forfeiture penalty 31 U.S.C. § 5317(c) with one who 'willfully' violates the reporting requirements and is subject to criminal prosecution under § 5222." *United States v. $359,000 in United States Currency,* 828 F.2d at 933 (see cases cited herein).

States Currency, No. 83-2578, slip op. at 3 (E.D. Pa. January 26, 1954), *aff'm,* 746 F.2d 1469 (3d Cir. 1984), the court stated, "In a civil forfeiture proceeding the word 'knowingly' applies to the transportation of money, not to the specific knowledge of the reporting requirements . . . knowledge of the actual transportation of money . . . *per se* invokes the reporting requirements." *Id*, at 3. In that case the claimant admitted he knowingly transported currency in excess of the minimum amount required to involve the reporting requirements. Likewise, Kim has admitted that he and Flack planned to transport approximately $349,700.00 into the United States, an amount well above the minimum of $10,000 required to invoke the reporting requirement. Consequently, defendant currency is subject to forfeiture pursuant to 31 U.S.C. § 5317(c) as currency traceable to the violation of the reporting requirements of § 5316.[10]

Although it is unclear from defendant's memorandum of laws defendant's counsel appears to argue that civil forfeiture under 18 U.S.C. § 981(a)(1)(C) for structuring money to evade filing the currency transaction reports required by 31 U.S.C. § 5324 also requires actual knowledge of the statute. In support of this proposition he quotes, *United States v. Rigdon,* 874 F.2d 774 (11th Cir. 1989), *cert. denied,* 110 S.Ct. 374 (1989), " 'failure to file a CTR is a crime if he had specific knowledge of the statute and to implementing regulations.' " Defendant's Memorandum of Law at 11. While this may be true, it does not address whether the currency is subject to civil forfeiture but rather what standard of intent is required to convict a defendant of a particular crime. Furthermore, claimant has admitted to knowingly and willfully structuring his transactions to evade filing

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10. Even if I were to accept Kim's argument that actual knowledge is required, defendant currency would nevertheless be subject to forfeiture because Kim admitted to conspiring to violate the statute thereby admitting actual knowledge of the statute and willful intent to violate it.

CTRs in violation of § 5324. Defendant currency is, therefore, also subject to forfeiture under 18 U.S.C. § 981(a)(1)(C).

CONCLUSION

After considering all the motions, affidavits, and documents of record, I conclude that the only issues presented in this case are purely questions of law, which, when properly resolved, leave no genuine issue of material fact to be considered, and the United States is therefore entitled to summary judgment as a matter of law. Accordingly, the motion of plaintiff United States for summary judgment shall be granted. An appropriate order follows.

(2)

No. 91-288

In the Supreme Court of the United States

OCTOBER TERM, 1991

BONG Y. KIM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly granted summary judgment in an *in rem* forfeiture action.

2. Whether currency brought into the United States in violation of the reporting requirements of 31 U.S.C. 5316 is subject to forfeiture under 31 U.S.C. 5317 only if the owner of the currency has knowledge of the reporting requirements.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)	8, 11
Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986)	8
Sandstrom v. *Chemlawn Corp.*, 904 F.2d 83 (1st Cir. 1990)	14
United States v. *Arriaga-Segura*, 743 F.2d 1434 (9th Cir. 1984)	14
United States v. *7715 Betsy Bruce Lane*, 906 F.2d 110 (4th Cir. 1990)	9
United States v. *$47,980 in Canadian Currency*, 804 F.2d 1085 (9th Cir. 1986), cert. denied, 481 U.S. 1072 (1987)	12
United States v. *$48,595*, 705 F.2d 909 (7th Cir. 1983)	12
United States v. *$55,518.05 in U.S. Currency*, 728 F.2d 192 (3d Cir. 1984)	9
United States v. *$122,043 in U.S. Currency*, 792 F.2d 1470 (9th Cir. 1986)	12
United States v. *$359,500 in U.S. Currency*, 828 F.2d 930 (2d Cir. 1987)	12
United States v. *$359,500 in U.S. Currency*, 645 F. Supp. 638 (W.D.N.Y. 1986), remanded, 828 F.2d 930 (2d Cir. 1987)	13
United States v. *Granda*, 565 F.2d 922 (5th Cir. 1978)	12
United States v. *One (1) Lot of $24,900.00 in U.S. Currency*, 770 F.2d 1530 (11th Cir. 1985)	12

Statutes, regulations and rule: Page

18 U.S.C. 981 ..... 7, 11, 14
18 U.S.C. 981(a)(1)(A) 2, 14
18 U.S.C. 981(a)(1)(C) (Supp. IV 1986) 2, 7, 9
18 U.S.C. 981(a)(2) 11, 14
31 U.S.C. 5313 3
31 U.S.C. 5313(a) 5
31 U.S.C. 5316 ..... 2, 5, 6, 7, 8, 9, 11, 12, 13, 14
31 U.S.C. 5316(a) 5
31 U.S.C. 5316(a)(1)(B) 12, 15
31 U.S.C. 5316(b) 5
31 U.S.C. 5317 ..... 11, 13, 14
31 U.S.C. 5317(c) 2, 7, 9, 11
31 U.S.C. 5322 13
31 U.S.C. 5324 ..... 2, 5, 7, 9, 11
31 C.F.R.:
Sections 103.21-103.27 6
Section 103.22 3
Section 103.23(a) 15
Section 103.23(b) 15
Fed. R. Civ. P.:
Rule 56 8
Rule 56(c) 8, 11
Rule 56(e) 10

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-288

BONG Y. KIM, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 931 F.2d 52 (Table). The memorandum and order of the district court (Pet. App. A4, A5-A15) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1991. A petition for rehearing was denied on April 11, 1991. Pet. App. A3. The petition for a writ of certiorari was filed on July 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a civil *in rem* action in the United States District Court for the Eastern District of Pennsylvania, the United States was granted summary judgment against approximately $350,000 of petitioner's currency. The district court held that the currency was subject to forfeiture (1) under 31 U.S.C. 5317(c), because it had been transported into the United States without compliance with the applicable reporting requirements, in violation of 31 U.S.C. 5316; and (2) under 18 U.S.C. 981(a)(1)(C) (Supp. IV 1986), because it was the subject of transactions structured to avoid the filing of currency transaction reports, in violation of 31 U.S.C. 5324.[1] The court of appeals affirmed. Pet. App. A1-A2.

1. In late 1987, petitioner and Gary Flack devised a plan for bringing approximately $350,000 in United States currency from Korea into the United States. The money was purportedly the proceeds of a sale of property that petitioner had inherited. Pet. App. A6; Gov't C.A. Br. 5.

In accordance with the plan, petitioner sent Flack $3000 for travel expenses in early December 1987. Later that month, Flack flew to Korea, and several days later he returned to the United States with $349,700 in currency. Petitioner met Flack at the Los Angeles International Airport, and the two then went to the home of petitioner's cousin, where Flack gave petitioner the money. Flack told petitioner that when Flack passed through customs at the airport,

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[1] In November 1988, Congress repealed 18 U.S.C. 981(a)(1)(C) (Supp. IV 1986), and the statute was replaced by an amended version of 18 U.S.C. 981(a)(1)(A). The repeal and replacement of former Section 981(a)(1)(C) are not material to the issues raised in the petition. See Pet. App. A5 n.2.

he had hidden some of the currency in his boots and the rest of it in his luggage. Pet. App. A6; Gov't C.A. Br. 5-6.

In early January 1988, petitioner tried to convert the $349,700 to a cashier's check at the Bank of America in Los Angeles. When a bank employee told petitioner that a currency transaction report (CTR) would have to be filed, petitioner left the bank without converting the currency.[2] Thereafter, petitioner took the currency back to Allentown, Pennsylvania, where he lived. Pet. App. A6; Gov't C.A. Br. 6.

Petitioner knew that he could not make deposits of $10,000 or more in currency without attracting attention. After studying a pamphlet from a bank regarding the requirement of filing CTRs for such deposits, he concluded that he could avoid the requirement by making deposits of less than $10,000 each. Accordingly, from January 6 to 19, 1988, he made 36 deposits of $8500 to $9600 in currency at 11 banks. By January 21, 1988, he had consolidated these 36 deposits into four separate accounts: a certificate of deposit at Firstrust Savings Bank, a certificate of deposit at Hill Financial Savings Association, and a savings account and a checking account at Meridian Bank. Pet. App. A6-A7; Gov't C.A. Br. 6-7.

As part of these efforts, on January 15, 1988, petitioner attempted to open an account at the Bank of Pennsylvania with $8500 in cash. When the teller told him that a CTR would have to be filed for that transaction, petitioner asked to buy a cashier's check

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[2] As discussed *infra*, the Internal Revenue Service requires the filing of currency transaction reports when a financial institution is involved in a monetary transaction in an amount of $10,000 or more. 31 U.S.C. 5313; 31 C.F.R. 103.22.

with the money. When the teller said that a CTR would also be required for that transaction, petitioner left the bank without transacting any business. Gov't C.A. Br. 7.

Between January 22 and 25, 1988, agents of the Internal Revenue Service (IRS) interviewed employees of the banks where petitioner had made his deposits. The bank employees informed the agents of the details of petitioner's transactions. Gov't C.A. Br. 7-8.

On February 2, 1988, IRS Special Agent Wayne Campbell contacted petitioner and advised him of his *Miranda* rights. Petitioner then made a statement in which he admitted that he had conspired with Flack to transport the currency into the United States. He also admitted that he knew about the CTR requirements and had attempted to avoid the filing of CTRs on his deposits. Finally, he admitted that as of February 1, 1988, approximately $330,000 of the money that Flack had transported into the United States was deposited in accounts at Firstrust Savings Bank, Hill Financial Savings Association, Meridian Bank, and Northeastern Bank. Petitioner gave Agent Campbell a diary that listed the amounts of money deposited in the four consolidated accounts and identified the sources of those deposits. On January 29, 1988, on the basis of an affidavit provided by Agent Campbell, a United States magistrate authorized seizure warrants for the funds in the four consolidated accounts, and the funds were seized from the accounts. Gov't C.A. Br. 8-9.

In March 1988, the government filed a complaint seeking forfeiture of the seized currency. Petitioner filed a claim of ownership of the currency and an answer to the complaint. The district court later stayed

the forfeiture proceeding pending disposition of the criminal proceedings that had been initiated against petitioner and Flack. Gov't C.A. Br. 3.

2. The government charged petitioner and Flack with conspiring to transport $349,000 in currency into the United States without filing the report required under 31 U.S.C. 5316.[3] In addition, petitioner was charged with 39 counts of structuring bank transactions to avoid the filing of CTRs, in violation of 31 U.S.C. 5324.[4] On December 6, 1988, petitioner

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[3] 31 U.S.C. 5316(a) provides in relevant part:

> [A] person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—
>
> (1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—
>
> (A) from a place in the United States to or through a place outside the United States; or
>
> (B) to a place in the United States from or through a place outside the United States * * *.

Subsection 5316(b) prescribes the information that reports required under subsection 5316(a) must contain and authorizes the Secretary of the Treasury to prescribe further requirements by regulation.

[4] 31 U.S.C. 5324 provides in relevant part:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> * * * * *
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

The provision to which Section 5324 refers—Section 5313(a)—requires domestic financial institutions to file CTRs when they are involved in cash transactions of the type and amount described in regulations promulgated by the Secretary of the Treasury. 31 U.S.C. 5313(a). Those regulations generally

pleaded guilty to the conspiracy charge and two of the structuring charges. The government agreed to drop the remaining structuring charges in return for petitioner's plea and cooperation. On January 18, 1989, Flack also pleaded guilty to conspiracy to violate 31 U.S.C. 5316. Gov't C.A. Br. 9-10.

At the hearing regarding petitioner's plea, the government described the factual basis for the plea, including petitioner's statement to the IRS agents; documents showing that neither petitioner nor Flack had filed the customs reporting forms required for transporting the $349,000 into the United States; documents showing that petitioner had made over 30 deposits of approximately $9000 each between January 6, 1988, and January 19, 1988; and a consensually monitored telephone call between petitioner and Flack in which Flack admitted that he had illegally failed to file the required customs forms. Petitioner admitted that the factual basis set forth by the government was correct and that he had committed the three offenses to which he was pleading guilty. Gov't C.A. Br. 10.

3. After the criminal proceedings concluded, the government moved for summary judgment in the forfeiture proceeding. In support of that motion, the government submitted, *inter alia*, petitioner's plea colloquy, petitioner's statement to the IRS agents, Flack's guilty plea, and the affidavit of IRS Agent Campbell in support of the seizure warrant, which detailed his investigation of petitioner's deposits of the currency. Pet. App. A6-A8, A10-A11. The district court held that the government had established probable cause for forfeiture by demonstrating that

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require that CTRs be filed for transactions involving $10,000 or more in currency. See 31 C.F.R. 103.21-103.27.

the currency was traceable to violations of 31 U.S.C. 5316 and 5324. Pet. App. A10-A11. The court further held that petitioner had not raised any genuine issue of material fact. *Id.* at A11. The court rejected petitioner's contention that use of his guilty plea should be narrowly circumscribed.[5] The court also rejected the argument that actual knowledge of the reporting requirement of 31 U.S.C. 5316 is required for forfeiture under 31 U.S.C. 5317(c). Pet. App. A13-A14. The court held that, in any event, the currency in this case was subject to forfeiture not only under Section 5317(c) but also under 18 U.S.C. 981 (a)(1)(C) (Supp. IV 1986). Pet. App. A14-A15.

4. The court of appeals affirmed by judgment order. Pet. App. A1-A2.

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[5] Petitioner had argued that (1) in return for his guilty plea, the government had orally promised not to seek forfeiture of the currency; (2) only the amount of money involved in the two structuring counts to which he pleaded guilty should be subject to forfeiture under 18 U.S.C. 981(a)(1)(C) (Supp. IV 1986); and (3) his plea should not be used to support the government's claim for forfeiture under 31 U.S.C. 5317(c) because that claim was added to the forfeiture complaint after petitioner entered his plea. Pet. App. A11-A12. The court held that petitioner was estopped from advancing the first argument because at the plea hearing "[petitioner], while under the advice of counsel, was specifically questioned and denied that any promises were made to him outside of the ones set forth in the plea agreement." *Id.* at A12. As to petitioner's second and third arguments, the court observed that "there is no requirement that a defendant be informed of the collateral consequences of pleading guilty." *Ibid.* In addition, the court held that the amount of money subject to forfeiture under Section 981 was not limited to the amount of money involved in the two structuring counts, because there was evidence in addition to the plea agreement that supported the government's Section 981 claim. Pet. App. A13 n.8.

ARGUMENT

1. Petitioner contends (Pet. 8-12) that the district court erred when it granted summary judgment against his currency. He argues that (1) some of the government's documentary evidence was unreliable and (2) a material issue of fact existed as to whether petitioner knew of the reporting requirements of 31 U.S.C. 5316. These fact-bound claims are without merit.

Rule 56(c) of the Federal Rules of Civil Procedure provides that the court "shall" grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This Court has emphasized that the standard set forth in Rule 56 "[b]y its very terms * * * provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-248. Summary judgment is foreclosed only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Thus, the nonmoving party cannot defeat a properly supported summary judgment motion by reasserting factually unsupported allegations in the pleadings. *Id.* at 248-249; see *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325 (1986). Rather, the nonmoving party must present "significant probative evidence" sufficient "for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249.

As the district court recognized (Pet. App. A10), in civil forfeiture actions, the government has the initial burden of establishing probable cause to believe that there is a substantial connection between the property to be forfeited and the criminal activity defined in the relevant forfeiture statutes. See, *e.g.*, *United States* v. *7715 Betsy Bruce Lane*, 906 F.2d 110, 112-113 (4th Cir. 1990); *United States* v. *$55,518.05 in U.S. Currency*, 728 F.2d 192, 195 (3d Cir. 1984). Thus, in this case the government was required to show that the defendant currency could be traced to violations of 31 U.S.C. 5316 and 5324—*i.e.*, that it had been knowingly transported into the United States without filing the required customs report and had been the subject of bank transactions structured to avoid the filing of CTRs—and was therefore subject to forfeiture under 31 U.S.C. 5317(c) and 18 U.S.C. 981(a)(1)(C) (Supp. IV 1986), respectively. Once the government made this showing, the burden shifted to petitioner to demonstrate by a preponderance of the evidence that the currency was not subject to forfeiture. *$55,518.05 in U.S. Currency*, 728 F.2d at 196.

The district court correctly concluded that the government "clearly met its burden [of] demonstrating probable cause to believe the property is subject to forfeiture under both 18 U.S.C. § 981 and [31] U.S.C. § 5317." Pet. App. A10. The government's evidence included petitioner's guilty plea, Flack's guilty plea, petitioner's admissions during the plea proceeding, his statement to Agent Campbell, and Agent Campbell's affidavit in support of the seizure warrant. As the district court found, that evidence established a clear connection between petitioner's currency and the criminal activity defined by 31 U.S.C. 5316 and 5324. Pet. App. A10-A11.

As in the courts below, petitioner contends that some of the government's evidence was "flawed" (Pet. 10), but none of the alleged "flaw[s]" raises a genuine issue of material fact. Although petitioner criticizes the district court's reliance on petitioner's diary (Pet. 9-10), petitioner himself told IRS agents that it was "his personal diary" and voluntarily turned it over to them for copying. C.A. Supp. App. 182. Moreover, as the district court recognized, even without the diary the evidence was sufficient to warrant summary judgment. Pet. App. A8 n.3. Petitioner also errs in attacking (Pet. 10) the district court's reliance on Agent Campbell's memorandum of his interview with petitioner and on the agent's affidavit in support of the seizure warrant. Although the government initially submitted unsigned copies of the memorandum and the affidavit, it later presented a signed and dated copy of the affidavit, and a signed and dated affidavit of Agent Campbell describing the circumstances in which petitioner provided his statement and diary to the agent. C.A. Supp. App. 278-290. This procedure was fully consistent with Fed. R. Civ. P. 56(e) (permitting the filing of additional affidavits in support of summary judgment motion). Although petitioner challenged the procedure by which the documents were submitted, he did not challenge their contents. C.A. Supp. App. 313. The district court was therefore correct in concluding that petitioner's challenge to the government's evidence did not raise any genuine issue of material fact. See Pet. App. A8 n.3.

Petitioner argues, finally, that summary judgment was precluded by the disputed issue of "whether the alleged violations were committed without [his] knowledge." Pet. 11. Petitioner asserts that the issue of knowledge was material to the existence of a

statutory defense under 18 U.S.C. 981(a)(2).[6] Petitioner cannot now rely on Section 981(a)(2) to identify a material dispute, however, because he did not assert a defense under that provision in the district court. Gov't C.A. Br. 22. Because petitioner plainly bore the burden of asserting that defense in the district court, his failure to do so bars him from relying on it now as a basis for challenging the district court's entry of summary judgment. See *Anderson*, 477 U.S. at 248 (substantive law governing proof at trial identifies which disputes are "material" for purposes of Fed. R. Civ. P. 56(c)).

2. Petitioner further contends (Pet. 12-15) that the currency is not subject to forfeiture under 31 U.S.C. 5317 because he did not have knowledge of the reporting requirements of 31 U.S.C. 5316. The courts below correctly rejected that contention. Knowledge of the reporting requirements is not a condition of forfeiture under Section 5317, and even if it were, such knowledge existed in this case.

The text of the relevant provisions makes clear that knowledge of the reporting requirements prescribed in Section 5316 is not required for civil forfeiture under Section 5317. Section 5317(c) provides in relevant part:

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[6] 18 U.S.C. 981(a)(2) provides:

> No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder.

As explained above, Section 981 authorizes forfeiture of currency involved in transactions structured to avoid the filing of CTRs, in violation of 31 U.S.C. 5324.

> If a report required under section 5316 with respect to any monetary instrument is not filed * * *, the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States * * *.

Section 5316 provides that a report is required whenever "a person or an agent or bailee of the person * * * knowingly—(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 * * * to a place in the United States from or through a place outside the United States." 31 U.S.C. 5316(a)(1)(B). The statutory language thus indicates that money must be "knowingly transport[ed]" to be subject to forfeiture, but it contains nothing to suggest that knowledge of the statutes themselves is required. Accordingly, most courts to consider the issue have concluded that no such knowledge is required. See *United States* v. *$359,500 in U.S. Currency*, 828 F.2d 930, 932 (2d Cir. 1987) (citing cases); see also, *e.g.*, *United States* v. *$47,980 in Canadian Currency*, 804 F.2d 1085, 1090 (9th Cir. 1986), cert. denied, 481 U.S. 1072 (1987); *United States* v. *$122,043 in U.S. Currency*, 792 F.2d 1470, 1474 (9th Cir. 1986).[7]

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[7] None of the cases relied on by petitioner (Pet. 13) presents a conflict requiring resolution by this Court. Both *United States* v. *Granda*, 565 F.2d 922, 925-926 (5th Cir. 1978), a criminal case, and *United States* v. *$48,595*, 705 F.2d 909, 914 (7th Cir. 1983), involved false statements on customs reporting forms that may have been caused by the inartful drafting of the forms, rather than by any criminal intent. In *United States* v. *One (1) Lot of $24,900.00 in U.S. Currency*, 770 F.2d 1530, 1536 (11th Cir. 1985), while the court upheld the dismissal of a forfeiture complaint because it failed to allege that the transporter of the currency knew of the reporting requirements, the court emphasized that "nothing in the lan-

Petitioner nonetheless argues (Pet. 13) that the phrase "knowingly transport[ed]" should be interpreted to apply only to currency transported in "willful[] violat[ion]" of the reporting requirement. Such a judicial rewriting of statutory text would be particularly inappropriate in this context. Congress expressly included the "willful[] violat[ion]" of the reporting requirements as an element of the *criminal offenses* prescribed in 31 U.S.C. 5322. The omission of any similar language in the *civil forfeiture* provisions strongly suggests that Congress did not intend willfulness to be an element of proof in forfeiture proceedings. See *$359,500 in U.S. Currency*, 828 F.2d at 933.

In any event, assuming *arguendo* that knowledge of the reporting requirements were a condition of civil forfeiture, that condition was satisfied in this case. It is undisputed that Flack was aware of the reporting requirements when he transported the money into the United States. Flack admitted as much in a phone call to petitioner and by later

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guage of the statute or its legislative history indicates that the innocence of the *nontransporting* owner or claimant prevents forfeiture." Petitioner was the nontransporting owner of the currency at issue here, and therefore under *$24,900 in U.S. Currency* petitioner's asserted lack of knowledge did not bar forfeiture. As discussed *infra*, the transporter of the currency in this case, Flack, was well aware of the reporting requirements, and his knowledge satisfied any knowledge requirement in the statute. Finally, petitioner's repeated reliance (Pet. 12, 14) on *United States* v. *$359,500 in U.S. Currency*, 645 F. Supp. 638 (W.D.N.Y. 1986), remanded, 828 F.2d 930, 936 (2d Cir. 1987), is misplaced. On appeal of that decision, the Second Circuit expressly rejected the district court's holding that knowledge of the reporting requirement of Section 5316 is a condition of forfeiture under Section 5317. 828 F.2d at 932-934.

pleading guilty to conspiring to violate 31 U.S.C. 5316. Gov't C.A. Br. 10. Flack's culpability satisfied any requirement that currency be transported into the United States with knowledge of the reporting requirements. As the district court observed, because the proceedings were *in rem*, the government was required only to show that the currency was involved in a statutory violation; the government was not required to show that petitioner, or any other particular individual, committed the violation. Pet. App. A10.

Moreover, petitioner admitted to criminal knowledge of the reporting requirements by pleading guilty to conspiring with Flack to violate Section 5316. See *United States* v. *Arriaga-Segura*, 743 F.2d 1434, 1436 n.2 (9th Cir. 1984) (guilty plea constitutes admission of all facts necessary for conviction). Petitioner may not now attempt to avoid the consequences of his plea by disavowing culpability. See, *e.g.*, *Sandstrom* v. *Chemlawn Corp.*, 904 F.2d 83, 87-88 (1st Cir. 1990).[8]

Finally, petitioner's present disclaimer of knowledge, even if accepted at face value, does not suffice to show that he was unaware of the reporting requirements. Here, as in his plea colloquy, petitioner carefully circumscribes his assertion of ignorance of the law. Petitioner claims that "he was unaware [that] Flack was not going to file the [customs] form upon arrival in Los Angeles." Pet. 11. Petitioner

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[8] Contrary to petitioner's suggestion (Pet. 13), the "innocent owner" defense in 18 U.S.C. 981(a)(2) does not apply to property subject to forfeiture under Section 5317. The Section 981(a)(2) defense applies only to property subject to forfeiture under Section 981. 18 U.S.C. 981(a)(1)(A) and (a)(2).

does not dispute, however, that he was put on notice of the filing requirement when Flack told petitioner about going through customs with the money hidden in Flack's boots and luggage. See Pet. App. A6. At that point, the money was still subject to the filing requirement prescribed in Section 5316. Section 5316 applies when a person "transports, is about to transport, *or has transported*" more than $10,000 into the United States. 31 U.S.C. 5316(a)(1)(B) (emphasis added). That requirement, moreover, applied not only to Flack, as the person who transported the currency, but also to petitioner, as the person who aided in the transportation of the money and who received it. 31 C.F.R. 103.23(a) and (b). In short, petitioner was required to file a customs report at the time the money came into his hands, and there was uncontradicted evidence that at that point he was on notice of that requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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